**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2014 MSPB 25**

Docket No. DC-0752-12-0701-I-1

**Bridget Hooper,**

**Appellant,**

**v.**

**Department of the Interior,**

**Agency.**

April 8, 2014

Daniel Raposa, Esquire, Washington, D.C., for the appellant.

Josh C. Hildreth, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

## OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that sustained her removal. For the reasons set forth below, we DENY the petition and AFFIRM the initial decision, AS MODIFIED by this Opinion and Order. We have modified the initial decision to find that the administrative judge properly admitted and considered the appellant's evidence of post-removal rehabilitation.

## BACKGROUND

¶2 The appellant, an Administrative Assistant at the agency's National Business Center, appealed her removal based on charges of Absence Without

Leave, Falsification of Time and Attendance Records, Lack of Candor, and Improper Use of Government Property. Initial Appeal File (IAF), Tab 1. After a hearing, the administrative judge affirmed the agency's removal action, finding that the appellant stipulated that she engaged in the conduct described in the agency's charges, that she admitted during the hearing to engaging in the misconduct, and that her stipulation and subsequent admission satisfied the agency's burden of proving its charges by preponderant evidence. IAF, Tab 26, Initial Decision (ID) at 1, 3. The administrative judge also determined that the appellant failed to establish her affirmative defenses of prohibited discrimination based on sex and race and that the penalty of removal was reasonable under the circumstances and advanced the efficiency of the service. ID at 10-15.

¶3 The appellant has filed a petition for review of the initial decision. Petition for Review (PFR) File, Tab 1. The agency has filed a response in opposition to the appellant's petition, to which the appellant has replied. PFR File, Tabs 7-8.

## ANALYSIS

### The administrative judge correctly determined that the agency proved the charged misconduct.

¶4 The appellant has not challenged the administrative judge's determination that the agency proved its charges. PFR File, Tab 1 at 5-7. The administrative judge's determination is supported by the record. We therefore AFFIRM it.

### The administrative judge correctly determined that the appellant failed to establish her discrimination claims.

¶5 On review, the appellant contends that the administrative judge erred in determining that she failed to establish her affirmative defense of prohibited discrimination based on sex.[1] Her primary contention on review, as it was below,

[1] The appellant does not contend that the administrative judge erred in determining that she failed to meet her burden of proof regarding her claim of discrimination based on race. ID at 4-10; PFR, Tab 1 at 4 n.1.

is that two male employees—A.F. and S.F.—were suitable comparators, and that their more lenient treatment shows that the appellant's removal was the result of sex discrimination.[2] PFR File, Tab 1 at 24. We disagree.

¶6 For employees to be deemed similarly situated for purposes of an affirmative defense of discrimination based on disparate treatment, all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparator employees. *Adams v. Department of Labor*, 112 M.S.P.R. 288, ¶ 13 (2009). Therefore, comparators must have reported to the same supervisor, been subjected to the same standards governing discipline, and engaged in conduct similar to the appellant's without differentiating or mitigating circumstances. *Id.*; *see* ***, *Complainant v. Department of Defense*, EEOC Appeal No. 0120120444, 2013 WL 6384294, at *2 (E.E.O.C. Nov. 25, 2013); *Wingate v. U.S. Postal Service*, 118 M.S.P.R. 566, ¶ 7 (2012) (the Board must defer to the Equal Employment Opportunity Commission concerning issues of substantive discrimination law).

¶7 The administrative judge concluded that neither A.F. nor S.F. is similarly situated to the appellant because the charged misconduct was different and both employees were charged with drug use. ID at 6-8. The administrative judge's conclusions are supported by the record. There is no dispute that comparator A.F. is a Motor Vehicle Operator with the agency's Property Management Branch, and that the agency suspended A.F. for 14 days based on charges of misconduct and drug use. ID at 6; Hearing Transcript (HT) at 73. The misconduct at issue with A.F. was three instances of A.F. falling asleep at his desk over a 5-month period. IAF, Tab 15 at 100. It is also undisputed that comparator S.F. is a Property Management Specialist with the agency's Division

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[2] The appellant does not challenge the administrative judge's determination that the remaining alleged comparators were not similarly situated. ID at 5-10; PFR File, Tab 1 at 4 n.1.

of Logistics, and that the agency suspended him for 14 calendar days based on the charges of offensive touching and testing positive for illegal drugs. ID at 6-7; HT at 120. Neither A.F. nor S.F. was an Administrative Assistant; neither was assigned to the National Business Center; and neither was disciplined for AWOL, falsification of time and attendance records, lack of candor, or misuse of government property. Thus, all relevant aspects of the appellant's employment situation were not "nearly identical" to those of comparator employees A.F. and S.F., and those employees were not disciplined for having engaged in conduct similar to the appellant's "without differentiating or mitigating circumstances." *See Adams*, 112 M.S.P.R. 288, ¶ 13. Therefore, we agree with the administrative judge that those employees were not similarly situated for purposes of the appellant's affirmative defense of sex discrimination based on disparate treatment, and the appellant has presented no other evidence to establish that the agency discriminated against her based on her sex.

¶8 We note that, in reaching her conclusion that none of the proffered comparator employees were similarly situated for purposes of the appellant's discrimination claims, the administrative judge appears to have applied the Board's standard for disparate penalty analysis set forth in *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657, ¶¶ 6, 12-15 (2010), and *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶ 20 (2012). *See* ID at 10. The standard for determining whether employees are similarly situated for purposes of a discrimination claim, however, differs from the standard for determining whether they are similarly situated for purposes of a disparate penalty analysis. *See Lewis*, 113 M.S.P.R. 657, ¶ 15 n.5 (noting that the Board's standard for disparate penalties does not modify precedent concerning the determination of whether employees are similarly situated under Title VII). That is, for other employees to be deemed similarly situated for purposes of a disparate penalty analysis, the Board does not require that all relevant aspects of the appellant's employment situation be "nearly identical" to those of the comparator employees. Rather, an

appellant must show that there is enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently, but the Board will not have hard and fast rules regarding the outcome determinative nature of these factors. *Boucher*, 118 M.S.P.R. 640, ¶ 20; *Lewis*, 113 M.S.P.R. 657, ¶ 15. The agency's burden to prove a legitimate reason for the difference in treatment between employees is triggered by the appellant's initial showing that there is enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently. *Boucher*, 118 M.S.P.R. 640, ¶ 24.

¶9 Because, however, we reach the same conclusion that neither A.F. nor S.F. was a suitable comparator applying the more exacting standard for comparison under Title VII, the administrative judge's adjudicatory error in applying the standard in *Lewis* and *Boucher* was not prejudicial to the appellant's substantive rights. Thus, it provides no basis for reversal of the administrative judge's determination that the appellant failed to establish her discrimination claim. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

In removing the appellant, the agency exercised management discretion within tolerable limits of reasonableness.

¶10 In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), the Board set forth a nonexhaustive list of factors that are generally recognized as relevant in arriving at a penalty determination. The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Id.* at 306. An agency's determination of an appropriate penalty is not entitled to deference, however, when the deciding official does not consider the relevant mitigating circumstances. *Bivens v. Tennessee Valley Authority*, 8 M.S.P.R. 458, 461 (1981); *see Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶ 10 (2013). When the Board sustains all of an agency's charges, the Board

may mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's original penalty too severe. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

¶11 The appellant contends that, in determining that the penalty of removal was reasonable under the circumstances, the administrative judge failed to consider new, post-removal evidence bearing on her potential for rehabilitation. PFR File, Tab 1 at 11-16. We disagree.

¶12 In *Norris v. Securities & Exchange Commission*, 675 F.3d 1349, 1357 (Fed. Cir. 2012), the U.S. Court of Appeals for the Federal Circuit held that, where new evidence relevant to potential mitigation of the imposed penalty is presented to the Board (or an arbitrator), the evidence must be considered in determining whether the agency's imposed penalty was reasonable. In reaching this conclusion, the court relied on the Board's duty to develop a new record and "to conduct an independent assessment of the *Douglas* factors to determine the reasonableness of the penalty." *Id.* at 1356 (citing 5 U.S.C. § 7701(c)(1); *Douglas*, 5 M.S.P.R. at 305-06).[3] Although the court concluded that the arbitrator was required to consider post-removal evidence that was brought to his attention and remanded the appeal for further adjudication, it expressed no opinion as to the weight to be given such mitigating evidence. *Id.* at 1357.

¶13 In this matter, the record reflects that the administrative judge considered the appellant's evidence of her rehabilitation efforts consistent with *Norris*. The

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[3] In so ruling, the court noted that the Board has consistently recognized its obligation to consider new evidence affecting the penalty determination in weighing the *Douglas* factors. *Id.* at 1356 n.5 (citing *Sherlock v. General Services Administration*, 103 M.S.P.R. 352, ¶¶ 6, 16-19 (2006); *Singletary v. Department of the Air Force*, 94 M.S.P.R. 553, ¶ 15 (2003), *aff'd*, 104 F. App'x 155 (Fed. Cir. 2004); *Frye v. Department of the Army*, 63 M.S.P.R. 242, 246 (1994); *Tactay v. Department of the Navy*, 30 M.S.P.R. 363, 367-68 (1986); *Bryant v. General Services Administration*, 23 M.S.P.R. 425, 427 (1984); and *Hall v. Department of the Air Force*, 8 M.S.P.R. 347, 355 (1981), *aff'd in part, rev'd in part on other grounds sub nom. by Hall v. Merit Systems Protection Board*, 698 F.2d 1230 (9th Cir. 1983)).

administrative judge allowed extensive evidence and testimony regarding the appellant's post-removal rehabilitation, including her subsequent rehabilitation from alcohol addiction, her commencement of divorce proceedings against her abusive husband, and her adoption of healthy lifestyle choices. *See, e.g.*, IAF, Tab 14 at 11-25; HT at 23-27, 156, 161-63, 169, 171-86, 190-200 (testimony of the appellant and witnesses R.B., M.R., and R.T.). As to this evidence and testimony, however, the administrative judge stated that "an appellant's mere participation in a rehabilitative program cannot preclude an agency from instituting disciplinary action in every case in which an employee has sought and received assistance," as "[s]uch an interpretation, impermissibly undermines the agency's primary discretion in exercising its managerial obligation to maintain employee discipline and efficiency." ID at 14. The administrative judge recognized that the appellant submitted evidence of difficult personal circumstances including alcoholism, drug abuse, and an abusive husband and adult daughter. However, although the administrative judge "sympathize[d] with the appellant's [evidence of difficult personal] circumstances," she nonetheless deemed that the penalty of removal was reasonable and advanced the efficiency of the service. ID at 15.

¶14 We are not persuaded by the appellant's contention that, because the initial decision lacks a discussion of witness testimony bearing on her post-removal rehabilitation and does not contain any credibility determinations concerning that testimony, the administrative judge did not consider this testimony. PFR File, Tab 1 at 15. An administrative judge's failure to mention all of the evidence of record in the initial decision does not mean that she did not consider it in reaching her decision. *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table). Additionally, no credibility determinations were necessary concerning this testimony because the agency did not dispute it. Indeed, the parties stipulated that the appellant had entered a substance abuse rehabilitation program after

receiving the notice of proposed removal and that the appellant was successful with her substance abuse rehabilitation program. ID at 3. Overall, the record demonstrates that the administrative judge admitted and considered the appellant's evidence of post-removal rehabilitation.

¶15 Moreover, we have independently considered this evidence and agree with the administrative judge that it is not of sufficient weight to warrant mitigation of the penalty of removal in this case. *See Norris*, 675 F.3d at 1357 (discussing the Board's duty to weigh new evidence on mitigation). Indeed, as the administrative judge recognized, because a charge involving falsification is egregious, the Board has repeatedly upheld removal penalties in falsification cases. ID at 13; *see, e.g.*, *Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶¶ 21-22 (2005), *aff'd*, 180 F. App'x 951 (Fed. Cir. 2006); *Tanner v. Department of Transportation*, 65 M.S.P.R. 169, 173-74 (1994); *Brown v. U.S. Postal Service*, 64 M.S.P.R. 425, 433 (1994); *Daniels v. U.S. Postal Service*, 57 M.S.P.R. 272, 285-87 (1993); *Walcott v. U.S. Postal Service*, 52 M.S.P.R. 277, 284-85, *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table); *Ensinger v. Department of the Air Force*, 36 M.S.P.R. 430, 435 (1988).

¶16 The appellant also contends on review that the administrative judge erred in deferring to the agency's penalty determination because the deciding official failed to consider conscientiously whether the penalty was consistent with those imposed on other similarly-situated employees. PFR File, Tab 1 at 17-18. The appellant contends that removal was unreasonable under the circumstances, in part, because the agency allegedly issued less severe discipline to similarly-situated employees who engaged in similar misconduct. *Id.* at 20-24.

¶17 As discussed above, the consistency of the penalty with those imposed upon other employees for the same or similar offenses is one of the factors to be considered under *Douglas* in determining the reasonableness of an agency-imposed penalty. *Ly v. Department of the Treasury*, 118 M.S.P.R. 481, ¶ 12 (2012). Although, as stated above, the administrative judge correctly

determined that the appellant failed to meet her burden of proving her discrimination claims, this determination is not dispositive of the appellant's claim concerning the consistency of the penalty with those imposed upon other employees for the same or similar offenses. The Board therefore must consider the appellant's contention that the agency treated similarly-situated employees differently using the analysis set forth in *Boucher* and *Lewis*.[4] *See id.*, ¶ 13 (citing *Lewis* in discussing the appellant's burden to prove disparate penalties). We need not remand the appeal, however, because the record is fully developed on this issue. *Lewis*, 113 M.S.P.R. 657, ¶ 18.

¶18 As we discussed in the context of the appellant's discrimination claim, although the record reflects that comparators A.F. and S.F. were not removed, the circumstances surrounding their discipline are plainly distinguishable. The appellant has failed to show that there is enough similarity between both the nature of their misconduct and the other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently. *Id.*, ¶ 15. Accordingly, the appellant did not demonstrate that the penalty imposed upon her was inconsistent with penalties imposed upon other employees for the same or similar offenses.

¶19 The appellant also contends on review that the administrative judge erred in admitting the hearing testimony of the agency's Chief of Human Resources, Operations Division, to address the appellant's assertions in the context of her disparate treatment and disparate penalty claims that other similarly-situated

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[4] A determination that employees are not similarly situated for purposes of a discrimination claim under Title VII is not dispositive of whether those employees are similarly situated for purposes of a disparate penalties analysis under *Douglas*. That is, even if an appellant cannot demonstrate that the employment situation of a proffered comparator is "nearly identical" for Title VII purposes, *Adams*, 112 M.S.P.R. 288, ¶ 13, she may nonetheless be able to demonstrate enough similarity between both the nature of the misconduct and the other factors to trigger the agency's burden to prove a legitimate reason for the difference in treatment for disparate penalty purposes, *Boucher*, 118 M.S.P.R. 640, ¶ 24.

employees were treated more leniently. PFR File, Tab 1 at 25-26; IAF, Tab 17 at 5. The appellant objects on the grounds that: (1) because the Chief of Human Resources was not identified as a person with information relevant to the appeal until the agency filed its prehearing submission, the appellant was unable to depose her; (2) the Chief of Human Resources was not directly involved in disciplining the appellant or several of the proffered comparators; and (3) a former human resources official would have been a more appropriate witness to testify concerning discipline of comparators. PFR File, Tab 1 at 25-26.

¶20 Again, we disagree. The administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to admit the testimony of witnesses whose testimony would be relevant, material, and nonrepetitious. *Cf. Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985). We find no abuse of that discretion here. In this regard, we note that the appellant did not raise her discrimination claim until she filed her prehearing submission, IAF, Tab 12, Tab 14 at 4, and also that she had a full and fair opportunity to cross-examine the Chief of Human Resources and to offer argument concerning the weight that should be afforded to that testimony, HT at 142-46. Further, although the appellant deposed the former human resources official, PFR File, Tab 1 at 25, she could have, but did not, name her as a witness. IAF, Tab 14 at 7-9.

¶21 Finally, the agency contends in its opposition to the appellant's petition for review that the administrative judge erred in excluding a June 20, 2011 letter of reprimand that it proffered as extrinsic evidence to impeach the appellant's hearing testimony that she had not been the subject of prior discipline. PFR File, Tab 7 at 9-10. The administrative judge excluded the exhibit on the ground that it could present a due process issue under *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1278-80 (Fed. Cir. 2011), as it was not mentioned in the proposal notice. HT 19-20. The agency has not explained how the disallowed exhibit would affect the result reached in this appeal. In this regard, we note that the agency had a full and fair opportunity to impeach the appellant's testimony through

cross-examination. HT at 28-42, 249-53. Thus, the agency has not established that the administrative judge abused her broad discretion in excluding this evidence. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981); *cf. Bucci v. Department of Education*, 42 M.S.P.R. 47, 55 (1989) (evidence offered merely to impeach a witness's credibility is not generally considered new and material for purposes of review).

¶22 The record supports the administrative judge's determination that the agency conscientiously considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. Although the appellant believes that mitigation is warranted under the circumstances of this case, we agree with the administrative judge that the agency's removal penalty did not exceed the bounds of reasonableness. *Lachance*, 178 F.3d at 1260 (when the Board sustains all of the charges, it may mitigate an agency's original penalty, if too severe, to the maximum reasonable penalty).

## ORDER

¶23 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

## NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of

repayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.